ABDUL LATIFF AVARATHAR

v.

LILY MUDA

FEDERAL COURT, KUCHING
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN FJ
TAN CHIAW THONG J
[APPEAL NO. 220 OF 1980]
7 SEPTEMBER 1981

CIVIL PROCEDURE: *Jurisdiction - Whether a Native Officer's Court has jurisdiction on question of division of property consequent upon the making of decree of divorce - Whether Native Court of Appeal has jurisdiction - Right of appeal through Native Court hierarchy - Whether a person can abandon such right to appeal and instead pursue a remedy in the High Court - Whether discretion of the High Court to stay proceeding properly exercised.*

The case was an appeal against the decision of the learned Judge in staying all proceedings in the High Court pending the outcome of the appeal to the District Native Court against the decision of the Native Officer's Court in Kuching.

The parties were married in 1964. During the marriage the appellant had made a number of investments in Malaysia in the name of the respondent with the purported intention that the respondent should be a trustee for him and their children. One such property was a piece of land with buildings, Lot 3284, s. 64, Kuching Town Land District (referred to as "Lot 3284"). In 1974, the Native Officer's Court dissolved the marriage. Pursuant to s. 41 of the Undang-undang Mahkamah Melayu, Sarawak, it was held, *inter alia*, that all properties "harta pencarian" acquired during the marriage were to be divided between the parties in the proportion of one-third to respondent and two-thirds to appellant.

The appellant appealed to the Native Court of Appeal against the decision but consequently, by a writ dated 2 July 1974, he sued the respondent in the High Court and claimed for:

(a) A declaration that he was the owner of Lot 3284.

(b) A declaration that the respondent held Lot 3284 in trust for him.

(c) An order that respondent transfers Lot 3284 to him, and

(d) Costs.

The respondent disputed the claim and counter claimed, referring to the decision of the Native Officer's Court.

In his submission before the High Court, the appellant stated that he had not proceeded with his appeal before the District Native Court as he was not prepared to take the respondent back as his wife since she was married to someone else, and he did not wish to proceed with the appeal on the question of properties. The appellant argued that although the Native Officer's Court had jurisdiction to make any order respecting division of property it was not an issue tried before that Court.

The learned Judge had stayed all proceedings pending the outcome of the appeal to the District Native Court.

Held:

[1] The remedies the appellant sought are available in the Native Court of Appeal. Section 9(2) of the Native Courts Ordinance (Cap. 43) makes it clear that the Native Court of Appeal shall have the same powers as vested in the High Court.

[2] The Native Officer's Court has jurisdiction to make an order dividing the properties acquired during the marriage of the parties. As both parties were Muslims, the question of division of properties acquired during the marriage of the parties can only be decided in the hierarchy of the Native Court system. Section 5(1) of the ordinance provides quite clearly that "Native Courts shall have jurisdiction, concurrent with such other courts as may be empowered" to try a variety of topics.

[3] The final forum to decide the appeal should be the Native Court of Appeal. Although the question of the division of property was not an issue tried before the Native Officer's Court, that Court, acting under s. 41 of Undang-undang Mahkamah Melayu, Sarawak, had made an order with regard to the "harta pencarian" consequent upon the making of the decree of divorce. Any appeal against the decree would necessarily involve consideration of the above consequential order regarding the division of property. And assumption by the High Court of jurisdiction upon the matter of the land would be in effect tantamount to the assumption of jurisdiction to decide upon a matter connected with the appeal, or to anticipate the result of the appeal.

[4] Where a statute creates a specific tribunal for the enforcement of any particular right, then a party seeking that right must resort to that tribunal and no other.

[5] If a party wishes to abandon his right of appeal through the Native Court hierarchy that is his concern but this is not to say that a Native Court has no jurisdiction to deal with "harta pencarian". Such a question should be left to be decided by the relevant appellate Native Court.

[Appeal dismissed with costs.]

Cases referred to:

Mandi anak Kerbau v. Tima anak Landa [1950] SCR 3
Indun anak Ugu v. Dendang anak Saing [1953] SCR 37
T.R. Manggai v. Government of Sarawak & Anor. [1970] 2 MLJ 41

Legislation referred to:

Interpretation Ordinance (Cap 1) (Sabah), s. 3(19)
Native Courts Ordinance (Cap 43) (Sarawak), ss. 5, (1), (1)(e), 9(2)
Malay Courts Ordinance (Sarawak), s. 41

For the appellant - K.C.I. Reddy; M/s. Reddy & Co.
For the respondent - Michael Tan; M/s. Ibrahim & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This appeal is against the decision of the learned Judge in staying all proceedings in the High Court pending the outcome of the appeal against the decision of the Native Officer's Court in Kuching.

The parties were married in October 1964. They have four children, three boys and a girl whose ages range from 9 years to 17 years. During the marriage the appellant made a number of investments in Malaysia in the name of the respondent with the purported intention that respondent should be a trustee for him and their children. One such investment

was a piece of land with buildings thereon situated at Sungei Apong Road, Kuching, described as Lot 3284, section 64, Kuching Town Land District (hereinafter referred to as Lot 3284). According to appellant not long after the transfer of Lot 3284 respondent changed her feeling for him and refused to stay with him. In fact, respondent sued him for divorce in the Native Officer's Court in Kuching. On 15 May 1974 the Native Officer's Court dissolved the marriage. Pursuant to s. 41 of the Undang-Undang Mahkamah Melayu Sarawak it was held, *inter alia* that all properties "harta pencarian" acquired during the marriage are to be divided between the parties in the proportion of one-third to respondent and two-thirds to appellant.

Appellant appealed against the decision. Consequently, by a writ dated 2 July 1974 appellant sued the respondent and claimed for (a) a declaration that he is the owner of Lot 3284; (b) a declaration that respondent held Lot 3284 in trust for him; (c) an order that respondent transfers Lot 3284 to appellant and (d) costs.

Respondent disputed the claim. She contended that Lot 3284 was an absolute gift from appellant. Alternatively, she claimed Lot 3284 to be "*harta percarian*" and she is entitled to one-third share therein. In her counterclaim she referred to the decision of the Native Officer's Court and asked appellant:

(1) for an account of all properties (harta pencarian) both real and personal acquired during their marriage; and

(2) for the transfer to her of one-third of all such properties (harta pencarian). Pending appeal the decision of the Native Officer's Court is binding on them.

Appellant's counsel complained about the appeal not being heard. But in his written submission he stated that he did not take steps to enable the District Native Court to hear the appeal as appellant is not prepared to take respondent back as his wife since she has now been married to someone. There is nothing to stop him from appealing against the decision on the division of properties. He merely said he did not wish to proceed with the appeal against the decision of the Native Officer's Court on the question of properties. He said in abandoning the appeal on the division of properties, he has nothing to lose. All these are his problems. How he sought to resolve them is for him to decide. But, having agreed to be tried by a special forum to which he is bound he cannot try to avoid the decision of that forum by seeking a remedy in respect of the same property in the guise of a declaration in the ordinary forum.

The remedies he sought are available in the Native Court of Appeal. Section 9(2) of the Native Courts Ordinance (Cap. 43) makes clear that the Native Court of Appeal shall have the same powers as vested in the High Court.

Before the learned Judge appellant argued that although the Native Officers Court had jurisdiction to grant divorce it had no jurisdiction to make any order respecting division of property. No authority was cited for his sweeping proposition. Following a dissolution of marriage it is not unusual for the Court granting the divorce to make a distribution order regarding the properties acquired during the marriage in appropriate shares to the parties in accordance with their customs. A guide has been drawn up to assist Judges, Magistrates and others on such matters. This can be found in Appendix XIV (pp. 308 onwards) in "*Cases on Native Customary Law in Sarawak*" by the Chief Justice (Borneo), published in 1979. Appellant cannot just come round to the High Court because he does not like the decision of the Native Officer's Court. He never said the Native Officer's Court has no jurisdiction over him in the matter. But, he challenged the jurisdiction of the Native

Officer's Court to make an order dividing the properties acquired during the marriage of the parties. That question can only be decided in the hierarchy of the native Court system. Both parties are Muslims. Section 5(1) of the said Ordinance provides in no uncertain terms that:

> 5(1) Native Courts shall have jurisdiction, concurrent with such other Courts as may be empowered to try the same over:
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> ...
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> (c) cases arising from the breach of the Malay Undang-Undang or Malay custom of Sarawak in which all the parties are Muslims;
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> ...
>
> (f) any matter in respect of which it may be empowered by any other written law to exercise jurisdiction.

Under s. 5 of the said Ordinance it is provided quite clearly that "Native Courts shall have jurisdiction, concurrent with such other Courts as may be empowered" to try a variety of topics. Every Native Court has jurisdiction in cases arising from breach of native law or custom where the parties are natives or in other matters if jurisdiction is conferred upon it by any Ordinance.

It may be useful to point out that the Application of Laws Ordinance (Cap. 2) makes provision for local circumstances in the general application of English law:

> 2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:
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> Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

Certain specific rules have been made under s. 3(19) of the Interpretation Ordinance (Cap. 1). These short rules are contained in the Native Officers (Exercise of Powers) Order which makes provision for application of native law by a Native Officer or Sarawak Administrative Officer.

The Sarawak Native Courts Ordinance is substantially the same as that of Sabah although the former may be more elaborate in many aspects, particularly, the set up of the hierarchy of the Courts. Divorce on grounds laid down by custom has never been disputed by the Court. In fact, it has been specifically approved by the Native Court of Appeal. The difficulty which arises on divorce concerns the question of distribution of matrimonial property. Another book compiled by the Chief Justice (Borneo) is "*Cases on Native Customary Law in Sabah*" published in 1973. For ease of reference those cases in Sabah will be referred to as Lee (Sabah) 1973 and in Sarawak as Lee (Sarawak) 1979.

In Sabah the usual *pencarian* rules have been enforced. See *Tiamsah binte Olod v. Kanali Lee, Cases on Native Customary Law in Sabah 1973*, p. 164 where land has been acquired during coverture the rights of children can be protected by caveat. See *Matin v. Laina Lee, Cases of Native Customary Law in Sabah 1973*, p. 118.

It is interesting to note that in *Mandi anak Kerbau v. Tima anak Landa* [1950] SCR 3 on the question whether or not the Native Court had jurisdiction to determine a matter of inheritance it was held that it did not as inheritance was not one of the topics under s. 5. However, in *Indun anak Ugu v. Dendang anak Saing* [1953] SCR 37 the native rules on the distribution of property of an Iban dying without issue were applied. Property classified as "barang lama" (acquired before marriage) was transmitted to the deceased's sisters. Whereas property classified as "barang bahru" (acquired during marriage) would normally be transmitted to the widow for the purpose of erecting monument to the deceased husband. As the widow did not do that but remarried instead the property was passed to the deceased's sisters.

In the implementation of native law principles by the native Courts certain misunderstandings are inevitable. There is bound to be conflict between the demands of the judicial system and the response of a quite different legal universe. Problems relating to jurisdiction occur at the boundaries of the legal systems but not so much in the application of substantive principles of native law. Jurisdiction is in fact an important subject for determination in the Native Court of Appeal. As a final court of appeal the Native Court of Appeal has often set out clearly the limitation of Native Court jurisdiction. Reference may be made to the case of *T.R. Manggai v. Government of Sarawak & Anor*. [1970] 2 MLJ 41 where appellant, instead of pursuing his appeal in the Native Court of Appeal tried to apply for a declaration in the High Court that the Resident's Native Court was *functus officio*. In dismissing the appeal this Court held that as the appellant had not pursued the alternative remedy available to him of an appeal to the Native Court of Appeal, the High Court was right in refusing to make the declaration. The case is also an authority for the proposition that where a statute creates a specific tribunal for the enforcement of any particular right then a party seeking that right must resort to the tribunal and no other. It is, therefore, not surprising that the learned Judge decided to order a stay since alternative remedy was available in the Native Court of Appeal.

The learned Judge was apparently concerned over the question of jurisdiction for he pointed out in his judgment at p. 33 of the appeal record that:

> Against the decision of the Native Officer's Court in Case No. 13/74 the plaintiff herein has lodged an appeal which is yet to be heard and the outcome of which may well affect all or some of the reliefs claimed by the parties in the action.

Although the appellant has contended, *inter alia* that the question of the division of property was not an issue tried before the Native Officer's Court, that Court, nevertheless, acting under s. 41 of the Undang-Undang Mahkamah Melayu Sarawak, has made an order with regard to the "harta pencarian" consequent upon the making of the decree of divorce. Any appeal against this decree being made would necessarily involve consideration of the above consequential order regarding the division of property (unless the appeal against divorce is allowed); and in this respect, the final forum to decide the appeal should be the Native Court of Appeal in the circumstances. Otherwise the assumption by the High Court of jurisdiction to decide upon the matter of the land in question would be in effect tantamount to the assumption to jurisdiction to decide upon a matter connected with the appeal, or to anticipate the result of the appeal. It may well be that the provisions of s. 5(1)(e) of the Native Courts Ordinance oust the jurisdiction of the Native Court in this respect but any decision as to whether this is so should, in our view, on the authority of *T.R. Manggai v. Government of Sarawak & Anor.* [1970] 2 MLJ 41; *Lee, Cases on Native Customary Law in Sarawak 1979*, p. 168 be made by the relevant appellate Native Court.

The right to appeal through the Native Court hierarchy should not be denied. If a party wishes to abandon his or her right that is his or her concern. There is nothing to say that a Native Court has no jurisdiction to deal with "harta pencarian". Such question should be left to the Native Court hierarchy. Whether the Native Officer's Court has jurisdiction or not is a matter for the Native Court hierarchy to decide. Until the matter has been finally decided there is nothing to prevent the learned Judge from properly exercising his discretion to stay. There is no reason for us to interfere with the exercise of his discretion. Accordingly, we would dismiss the appeal with costs.

Also found at [1981] CLJ 168